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ABSTRACT

In this booklet, the Council of Supervisors and Administrators of the City of New York seeks to offer hope that teachers' and principals' capacity for the reasonable exercise of authority has not been exhausted. There is a body of legal opinion that supports the authority of the principal in disciplinary matters. It is a misconception that a student is deprived of this rights if, as an outcome of an administrative hearing, he is suspended from school or denied further public education. The courts are far from committed to the doctrine that each and every disciplinary decision is subject to trial; the courts do not always see the principal as an adversary in his relationship with students. In the sections on due process, suspensions, free speech, free press, respect for the flag, personal appearance, and searches and seizures, the author suggests that fairness, common sense, and experience remain the staples in school discipline. The courts have not enjoined principals from acting on the belief that parents send children to school to learn and that no learning can be carried on where some students are permitted to prevent others from learning. (Author/JF)

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THE PRINCIPAL, SCHOOL DISCIPLINE, AND THE LAW

By Howard L. Hurwitz

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About the Author

Howard L. Hurwitz, Ph.D., Columbia University, 1943, is a vice president of CSA and principal of Long Island City High School. He is the author of ten books, including *An Encyclopedic Dictionary of American History*, and numerous historical and educational articles and reviews. His latest book, *Donald* (Pocket Books, 1973), is a biography of his mildly retarded son, now 30 years old.

COUNCIL OF SUPERVISORS AND ADMINISTRATORS
OF THE CITY OF NEW YORK
Local 1, School Administrators and Supervisors
Organizing Committee, AFL-CIO
186 Joralemon Street
Brooklyn, N.Y. 11201
(212) 852-3000

FOREWORD

In recent years school discipline has been undermined by the failure to recognize that student rights have concomitant responsibilities and by an inability to distinguish between the legitimate rights of students and the anti-social acts of individual pupils. Nevertheless, despite the erosion of the principal's power, the head of a school still has considerable latitude in the exercise of authority in disciplinary decisions.

In distributing this study of how prevailing legal opinion affects the principal's prerogatives in areas involving student rights, the Council of Supervisors and Administrators believes that school administrators should be aware of the broad discretion they still possess in disciplinary matters. The principal can still accord due process to those accused of misdeeds while protecting the rights of the 99% of their law-abiding classmates.

PETER S. O'BRIEN
President
Council of Supervisors and Administrators

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1. WHAT THIS BOOKLET IS ABOUT

In recent years school principals have been alerted to the requirements of due process in disciplining students. The weight of articles and news reports has borne down oppressively on beleaguered principals. It would appear that the principal is a weak reed easily bent by disruptive students armored with constitutional protection.

We have in our schools today some students who respond with "See my lawyer" when accosted for a disciplinary infraction. To be sure, this is an extreme reflection on the current syndrome in which too many students are hawkeyed on their rights but myopic as to their responsibilities.

The sharp decline in school discipline is linked inextricably to school crime and is often indistinguishable from it. New York City police records show that in 1973 there were 10,956 separate reports of school violence, including three murders, 26 rapes and some 2,000 assaults on teachers, pupils and others. The bulk of these crimes is committed by pupils on the school's register, although the depredations of intruders have received most of the publicity.

It is probable that the statistics understate the incidence of crime in the schools. Principals often do not report thefts, vandalism and simple assaults either to the police or to the Office of School Security because experience has shown that nothing is done about the specific crime and the time taken to file reports is wasted. In some cases, principals feel that frequent reporting might reflect discredit on the school.

The crime problem is so serious that the New York City Board of Education in its 1974-75 budget called for an increase in the number of school security guards so that elementary schools, as well as intermediate, junior and senior high schools, might be afforded additional protection. A few faculties have already been equipped with pen-like ultrasonic signaling devices that enable a teacher in trouble to call for help. Closed circuit television networks have been installed in some buildings to allow officials to keep their eyes on all entrances and exits, as well as hallways and the student cafeteria. Despite mounting concern and efforts to combat crime in the schools, the number of court

convictions of students and others is infinitesimal. Crime in the schools is most often viewed as a school matter and it is the principal who is expected to deal with it.

The Council of Supervisors and Administrators of the City of New York seeks in this booklet to offer hope to principals and teachers that their capacity for the reasonable exercise of authority has not been exhausted. There is a body of legal opinion that supports the authority of the principal in disciplinary matters. It is a misconception that a student is deprived of his rights if as an outcome of an administrative hearing he is suspended from school or, in increasingly rare instances, denied further public education.

The courts are far from committed to the doctrine that each and every disciplinary decision of a school administrator is subject to trial. The courts do not always see the principal as an adversary in his relationship with students. It is the exceptional case in which the student appealing to the courts can prove abuse of discretion.

In the sections on due process, suspensions, free speech, free press, respect for the flag, personal appearance, and searches and seizures which follow in this booklet, we suggest to principals that all is not lost. Fairness, common sense and experience remain the staples in school discipline. If they have eroded in some places, a remodeling is in order. The courts have not enjoined principals from acting on the belief that parents send children to school to learn and that no learning can be carried on where some students are permitted to prevent others from learning.

2. DUE PROCESS IN SCHOOLS AND COURT

It is clearly the responsibility of the school principal to be fair to the student who is accused of a disciplinary infraction. In large schools small infractions are handled by assistant principals or deans. In more serious cases, involving robbery, extortion, drug abuse, extensive vandalism, and assaults on teachers or students, the principal must act on the charges.

To infer that the principal has a cast of mind that assumes guilt of the accused and the ultimate punishment, expulsion, is contrary to experience. This is evident in New York from the negligible number of students expelled as an outcome of hearings.

Certainly, any student who is denied further public education should be afforded due process. Even lawyers, however, find due process hard to define. It has what textbooks call a "convenient vagueness" that makes its precise limits uncertain.

The U.S. Supreme Court put it succinctly in *Hannah* v. *Lorche*, 363 U.S. 442 (1960):

> "Due process" is an almost elusive concept. Its exact boundaries are undefinable, and its context varies according to specific factual contexts . . . . as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings.

Basically, due process is meant to ensure what the courts call "fundamental fairness." It is embodied in the 5th and 14th Amendments to the Constitution, which provide that neither the United States nor any state or local government may deprive a person of "life, liberty or property without due process of law."

Recent efforts to impose upon school discipline tortuous procedures in the name of due process have bogged school principals in a morass. The bitterness of some attacks on school principals and boards of education who have attempted to remove from the schools the most dangerous miscreants is almost psychopathic in its intensity.

No principal questions the desirability of assuring students a fair hearing in disciplinary cases. The mandate of common decency would dictate as much. What has happened, however, is that in a desire to apply an inapposite type of due process to the schools, the common sense relationship between teachers and children has been obscured. Critics assume unfairly that the principal is an adversary in disciplinary proceedings and that his powers must be curbed by lawyers acting on behalf of parents who are uninformed and students who are too young and helpless to defend themselves.

The role of the teacher in discipline has a long history rooted in the doctrine of *in loco parentis* set forth in Blackstone's *Commentaries* (1765-69), where it is said of the parent:

> He may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to anwer the purposes for which he is employed.

Blackstone's influence on American jurisprudence is undeniable. Recently, however, the courts in serious cases involving punishment of a child, far beyond any disciplinary action that a principal, superintendent or board of education might undertake, have acted to protect the student.

In the latter connection much is made of *In re Gault*, 387 U.S. 1 (1967). *Gault*, however, deals with the juvenile court system and not the schools. The U.S. Supreme Court ruled that a 15-year-old boy

sent to a correctional institution for an indefinite period is entitled to procedural safeguards including counsel, cross-examination of witnesses and the right to remain silent. The court denied the state's defense that it was acting as *parens patriae* rather than as an adversary.

It does not follow from *Gault* that the principal's office must be converted into a courtroom where the procedures of criminal courts must be observed. This common sense observation is quoted approvingly by the U.S. Supreme Court in *Healy* v. *James*, 408 U.S. 169 (1972).

> . . . school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure . . . the courts should interfere only where there is a clear case of constitutional infringement.

Clearly, it is a mistaken belief that due process is always the same everywhere. In fact, due process embodies various rules of fair play which are associated with different types of proceedings. The right to counsel is not constitutionally a requirement of due process in the school setting.

A U.S. District Court said this when it issued a general order on school disciplinary proceedings, 45 F.R.D. 133, D.C.W.D. Mo. (1968), stating:

> There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence. Rare and exceptional circumstances, however, may require provision of one or more of these features in a particular case to guarantee the fundamental concepts of fair play.

The matter of due process and school discipline was combined neatly in a Texas case, *Wingfield* v. *Fort Bend Independent School District*, DC, SD Texas, no. 72-H-232 (April 23, 1973). A student found guilty of drinking vodka on the school grounds was suspended. He sought to have the suspension set aside by the courts because written notice had not been afforded him. Two hearings had, however, been held by the board of education and the court rejected the student's argument by stating that the second hearing cured any defects of the first hearing. The court went on to say:

> Among the things a student is supposed to learn at school . . . is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the ques-

> tioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools the better. . . . Except in extreme cases the judgment of school officials should be final in applying a regulation to an individual case.

It is to be noted, therefore, that a school is not a courtroom and if a disciplinary rule has a rational basis in regulating the conduct of a student due process will be constitutionally attained.

3. STUDENT SUSPENSIONS

In New York, until 1969, the requirements of due process in disciplinary matters were satisfied by a guidance-type hearing at the principal's and superintendent's level. The change in Education Law, Sec. 3214, coincided with a precipitous increase in the number of school disruptions by individuals. Yet, the number of suspensions and expulsions are so few that it might seem that all is quiet on the Northeastern front. Actually, in a 10-month period (1971-72), high school principals in New York City reported 5,091 infractions, including assaults on teachers and students, fires and robberies. The New York City Council reviewed this record in its report on school security (1973) and observed:

> It is ironic that despite the high rise in crime, there were only 129 suspensions in 1971-72.

It is not irony but a spirit of self-preservation that impels principals to abjure suspensions. There are simply not enough hours in the day to engage in the litigation now imposed on the New York principal. Suspension regulations enmesh him in complicated procedures before, during and after the quasi-judicial hearing in his office. To initiate a suspension the principal must try to reach the parent by phone; then send a certified letter to the parent detailing the specific charges. The letter must set forth the student's right of representation and the appeals procedure to be followed should the principal's decision be unsatisfactory. A suspension must be reviewed on a daily basis and may not continue beyond five days unless a hearing has been afforded.

At the hearing in the principal's office, witnesses or the victim may be questioned by the suspended student, his parents and the representative of the accused. The latter may be an attorney. All this,

even before the case can be removed to an assistant superintendent's level, is disrupting some schools.

Even the most naive critic of the principal should perceive that exposing the victim to the accused in this way may do more than dry up sources of information essential in such crimes as robbery, extortion, vandalism and drug abuse. The "questioning" may well result in a severe beating for the victim. And what principal can assure the safety of a student who is threatened?

You may be thinking that the crimes listed should not be in the principal's province at all, although they happen in the school. Right on to the courts! But the courts have heavy schedules and slow processes. Principals who have gone to court can attest to being tied up interminably in court appearances (where postponement and plea bargaining is the name of the game). There is also the reluctance of parents to permit children to appear as witnesses once the case (a school matter) is moved to the courts. Even when students say they will appear, parents often dissuade them from doing so—for understandable reasons.

The relationship of school and court was assessed by the U.S. Court of Appeals for the Second Circuit (New York, Connecticut and Vermont) in *Madera* v. *Board of Education*, 386 F. 2d 778 (1967):

> Law and order in the classroom should be the responsibility of our respective educational systems. The Courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings—which they definitely are not.

In suspensions that are referred to an assistant superintendent, the principal is obliged to appear without counsel to face the accused and his attorney. The principal must be accompanied by those who have firsthand knowledge of the charges—a dean, teacher and students. In these proceedings school personnel have been kept out of school for a day and more, often having to appear again at the central office when the accused does not appear and the hearing is rescheduled.

Under New York Education Law a case is not necessarily settled at the assistant superintendent's level. The accused (but *not* the accuser) may appeal the decision to the Chancellor, then to the Board of Education, and on to the Commissioner.

Both the New York City Board of Education and the New York State Commissioner of Education have been vigilant in safeguarding the rights of suspended students. In the *Matter of Castaldi* (May 28, 1970), the Board of Education ordered the readmission of the petitioner to his former school and the deletion of all record of the disciplinary action from the student's file. The Board held that the charge

in the case was much too broad, resulting in a hearing in which the reason for the suspension was neither clarified nor justified. Neither petitioner nor his parents received notice of the specific charges via certified mail, an omission which, according to the Board's ruling, erased all possibilities of a fair and impartial hearing. In conclusion, the Board noted that the petitioner was under continuous suspension for more than five days, violating the statutory limitation.

The New York Commissioner of Education is equally exacting. In the *Matter of Watson,* 10 Ed. Dep't Rep. 90 (1971), he found several procedural deficiencies in a disciplinary hearing following which the petitioner's son was expelled from school. There was, first of all, no verbatim stenographic transcript of the proceedings, making a review of the hearings impossible. Second, the petitioner was not permitted to cross-examine the teacher whom he was charged with assaulting. Further, at the conclusion of the hearing, the board introduced into evidence the student's anecdotal record, despite the fact that notice of the use of such evidence had not been given and the petitioner had insufficient time to formulate a defense.

It also appeared that prior suspensions referred to in the record—each of which was for less than five days—had been ordered by the school's administrative assistant. But the Education Law, Sec. 3214 (3) (b), delegates the power to suspend for a period of not more than five days to the district or school principal, and to no one else. These prior suspensions, then, were also illegal and were expunged from the student's record. The Commissioner ordered the petitioner's son reinstated.

Principals who read these decisions, or learn of them by word of mouth, are shaken. The Board of Education and the Commissioner have gone beyond what some courts regard as fairness in matters of school discipline. They have made procedure the substance and substance the shadow. The principal who does not dot his "i's" in preparing a suspension case may have the case and student thrown back into his lap. Even when the "i's" are dotted and the "t's" crossed, the game in New York City resolves itself into one of musical chairs in which the guilty student is merely transferred to another school where he can continue the behavior which has made safety in the schools a number one issue.

The patient reader of Commissioner's decisions is sometimes rewarded for his pains by rulings which strengthen the authority of the principal. In *Matter of Henderson,* 11 Ed. Dep't Rep. (1971), a boy was sent home from school by an assistant principal and the suspension hearing was scheduled 11 days after the suspension. The Commissioner raised only one eyebrow at the procedural deficiencies. He

did not regard them as sufficient to set aside the board's decision. True, an assistant principal does not have the right to suspend a student, but this action was made moot by the formal determination of the board. And the fact that a hearing was held more than five days after the first day of suspension did not negate the hearing. As for practicalities, the student's record—age, attendance, credits and behavior—was not conducive to lessening the punishment.

In *Matter of Gaines,* 11 Ed. Dep't Rep. 129 (1971), a 16-year-old student was suspended for the balance of the school year for striking a teacher. He was, however, offered the opportunity of attending evening high school. The student argued that his suspension was too long. But the Commissioner held that a board of education is not obliged to provide education for suspended students over the compulsory school attendance age of 16.

In *Matter of Seward,* 12 Ed. Dep't Rep. 100 (1972), a petitioner charged that a hearing was not held within five days. The Commissioner advised that the proper remedy is to request a stay order. The petitioner added that the notice of hearing did not set forth the specific charges. The Commissioner held that the petitioner had indeed been fairly apprised of the charges by letters from the superintendent and the principal. Still unabashed, the petitioner stated that a list of prospective witnesses had not been furnished. The Commissioner countered that there was no such mandate in the Education Law. The appeal was dismissed.

In *Matter of Kendrick and Barnett,* 12 Ed. Dep't Rep. 18 (1972), the superintendent suspended two students for the remainder of the year with home teaching because they had been disorderly and insubordinate by intentionally shoving a teacher into a classroom door. The boys' parents claimed that the suspension was racially prejudiced. The Commissioner saw no evidence of prejudice and concluded that the boys had shoved the teacher. There had been a hearing, but the parents never appealed the superintendent's suspension to the board of education, a remedy specifically provided for in the suspension law. The Commissioner declined to set aside the suspension.

And a final case in the hope-for-a-better-day department: In *Matter of Davis,* 12 Ed. Dep't Rep. 130 (1972), four students at a high school basketball game attacked the cheer leaders of another school and struck a member of the professional staff with a belt. The four questioned "why they were singled out from a larger group involved in this incident." The Commissioner found "no evidence of discrimination." What is even more significant is that the Commissioner hearkened back to a decision of his predecessor to concur in this statement:

> It must be emphasized that the right and duty to make the decision as to whether or not a pupil has committed a breach of discipline, and, if so, the decision as to whether or not the misconduct was serious enough to warrant suspension or expulsion, is and must be that of the local school authorities. Neither the Commissioner of Education nor the courts wish to interfere with the exercise of that right and duty.

Local courts, too, sometimes apply the balm of common sense to the pleas of suspended students. There was the case of the 36 who entered the office of a New York City high school principal, blockaded the door, physically prevented him from leaving, and threatened him with bodily harm. The principal suspended the students and preferred criminal charges against them. The students demanded through their lawyers the right to attend school. They reasoned with the guile of boys who slew their parents and claimed sympathy as orphans, to wit, they could not be suspended in excess of five days without a hearing and because of the pending criminal charges they could not participate in such a hearing without forfeiting their right against self-incrimination; hence, the demand for return to school.

The board refused to reinstate them without a hearing. Subsequently, some of the 36 were returned to the school where they had imprisoned the principal; most were transferred to other New York City high schools.

With respect to denial of their right against self-incrimination, the New York Supreme Court in *Matter of Johnson* v. *Board of Education of the City of New York,* 310 N.Y.S. 2d 429 (S. Ct., Queens Cty, 1970) cited an Appellate Division decision which held that a defendant cannot ask a court to assume that his constitutional rights will be violated. Further, to follow the petitioner's logic, a student violating a rule but not guilty of a crime could be suspended longer than five days, whereas a student who has been charged with a serious crime would be allowed to attend school until the disposition of the criminal charges.

In the matter of mass action by students, the U.S. Court of Appeals for the Second Circuit held in *Farrell* v. *Joel,* 437 F. 2d 160 (1971), that students who strike or "sit in" must take the consequences of their action. The court upheld the suspension of a student informed by the principal that she could not "sit in" in the administrative offices of the high school. The student had also been informed that she and about 300 others involved in the protest would be given the right to meet with school officials to discuss the problem—a protest against the suspension of three students.

The announcement of the rule on "sit-ins" by the principal constituted sufficient notice for the suspension. The student was, however,

entitled to a hearing following the suspension. The court saw reasonableness in the need for immediate discipline in view of the age of the student involved.

Inability of school authorities to pursue in overburdened courts minor crimes, such as thefts, vandalism and simple assault, which are daily occurrences in many schools, confronts us with the necessity of restoring the power of the principal to administer reasonable discipline. That some judges are aware of this need was set forth in *Madera* v. *Board of Education (supra)*. The court denied adversary judicial status to student disciplinary hearings, noting that the educational administrators were not represented by a lawyer. The court held that granting right to counsel in a disciplinary hearing would destroy the purpose of the guidance conference—to provide for the future education of the student. The Supreme Court denied *certiorari,* 390 U.S. 1028 (1968).

There is no question but that the presence of a lawyer at a school hearing makes an adversary proceeding of what should be an effort on the part of the principal, parents and student to determine what is best under the circumstances. A lawyer brings into play the right of cross-examination. While this right is an absolute in court, it can be an absolute disaster in the principal's office.

The author has no difficulty in recalling a suspension hearing in which a 15-year-old student, previously suspended and transferred from another high school, was accused of hitting and robbing boys in a school lavatory. The accused, his parents and their attorney appeared in my office at the designated time. Early in the hearing the lawyer asked me to produce the complainant for questioning. The victim happened to be a small 14-year-old boy who, in my opinion, would have been thus exposed to the risk of a severe beating. He was unknown to the accused who had, in fact, attacked and robbed several students.

I refused to bring the complainant to my office because I could not guarantee his safety away from school. The case was appealed to the assistant superintendent and then to the Chancellor. The suspension was eventually sustained and the suspended student was transferred to a third high school.

As we have seen, the effect of the New York suspension law is to place the principal in the role of adversary in his relation to students who are charged with disciplinary offenses. Section 3214 of the Education Law is reenforced by a maze of local circulars.

Bills substantially modifying the suspension law were passed by both houses of the New York State Legislature and reached the Governor's desk in 1971 and 1972. He vetoed them at the request of New

York City's Mayor and those who seem to give greater weight to safeguards for delinquents than to the rights of their victims.

While the suspension law alone cannot account for the severe decline of discipline and educational standards in the New York public schools, it has contributed to their deterioration.

The New York principal must, of course, follow the existing suspension law. The Legislature and Governor may yet recognize that the type of due process they have imposed on the schools is inapposite and works to the advantage of school disrupters. Under existing regulations, the principal who can resolve disciplinary situations by consultation with the student and parents (accompanied by a friend, if so desired) will do well to avoid the cumbersome, time-consuming and unsatisfactory suspension law.

4. THE TINKER FREE SPEECH LEGACY

If there is any single Supreme Court decision that tolls the school bell for a principal, it is *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). The Tinker children were enrolled in public elementary and secondary schools. The principals had adopted a rule prohibiting the wearing of armbands. The Tinkers deliberately wore black anti-Viet Nam war armbands to their schools. The lower courts had recognized the right of the principals to anticipate disruption of their schools. Justice Abe Fortas, speaking for the Supreme Court majority, did not see it that way. He saw the Tinker children exercising 1st Amendment rights of free speech.

It is not, however, to be inferred from *Tinker* that the principal may not anticipate disruption and act to prevent it. Even Justice Fortas affirmed "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

Sitting on the *Tinker* bench, Justice Hugo Black, dissenting, anticipated undesirable results that he thought would follow from the concern that children might be denied free speech in school:

> Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students.

Although *Tinker* is programmed in the principals' memory bank, there has been considerable judicial printout since *Tinker*. The courts are increasingly mindful of the need for balancing the interests of the school as a whole and the basic rights of student citizens. Thus, even while ruling against school authorities who suspended students for distributing an "underground" newspaper off campus and outside school hours, the U.S. Court of Appeals for the Fifth Circuit (Alabama, Canal Zone, Florida, Georgia, Louisiana, Mississippi and Texas) was eloquent in *Shanley*, 462 F. 2d 960 (1972):

> Tinker's dam to school board absolutism does not leave dry the fields of school discipline. This court has gone a considerable distance with the school board to uphold its disciplinary fiats where reasonable. . . . Tinker simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation's priceless topsoil of the first Amendment.

Perhaps the clearest distinction between students' free speech rights, as set forth in *Tinker*, and the realities of running a school in a peaceful educational atmosphere, is contained in the highly significant decision of the U.S. Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee) in *Guzick* v. *Drebus*, 431 F. 2d 594 (1970), which postdates *Tinker*. The case was denied *certiorari* on appeal to the Supreme Court, 401 U.S. 948 (1971).

In *Guzick* a student appeared in Shaw High School, East Cleveland, Ohio, carrying pamphlets and wearing a button calling for student participation in an anti-Viet Nam war demonstration in Chicago. The school had a long-standing rule banning buttons arising from fraternity battles of an earlier era. The principal denied the student the right to distribute the pamphlets in the school and ordered him to remove the button. The student refused and was suspended.

The court looking squarely at *Tinker* said:

> We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction.

The Sixth Circuit gave weight to the Shaw rule against wearing buttons or using other means to identify supporters of a cause. It noted the changed racial composition of the school from all white to 70% black and 30% white. Buttons, the court said, "tend to polarize students into separate, distinct and unfriendly groups." It considered some recent buttons at Shaw: "White is right," "Say it loud, Black and Proud." It took note of a fight in the Shaw cafeteria following the Easter 1968 assassination of Dr. Martin Luther King, when a white student wore a button: "Happy Easter, Dr. King."

The court observed that in *Tinker* school authorities did not have a uniform rule on the wearing of insignia. Shaw did have such a rule. Even though the call for an anti-war demonstration did not necessarily invite racial unrest, the resumption of button-wearing at Shaw was seen to threaten disruption.

Judge Clifford O'Sullivan wrote simply and well in *Guzick*:

> We shall not attempt extensive review of many great decisions which have forbidden abridgement of free speech. We have been thrilled by their beautiful and impassioned language. They are part of our American heritage. None of the masterpieces, however, were composed or uttered to support wearing of buttons in high school classrooms. We are not persuaded that enforcement of such a rule as Shaw High School's no-symbol proscription would have excited like judicial classics. Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would, impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities.

The U.S. Court of Appeals for the Ninth Circuit (Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Alaska, Hawaii and Guam) further clarified the meaning of *Tinker* so that it is now uninhabitable as a refuge for would-be school disrupters whose attachment to rights has severed any link with responsibilities. In *Karp* v. *Becken*, 477 F. 2d 171 (1973), the court observed: "The Tinker rule is simply stated; application, however, is more difficult." Restraints on free speech even under *Tinker* may still be permissible. In support of its reasoning the court held that the 1st Amendment does not require school officials to wait until disruption actually occurs before they may act. *Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption. Because of the state's interest in education, the court stated, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner."

In a post-Tinker-pre-Karp case that did not reach the Supreme Court or, in fact, go further than the author's office, a student was brought to me by the dean of boys. He was wearing a button with the explicit direction: "F— the State." I advised him, audibly, to remove the button. He did so while citing *Tinker*. I took a few quiet minutes to convince him that he had misread *Tinker*. There remain those who would have preferred that the principal take a few ulcerous years to make the same point in court.

It should not be necessary for students to denigrate the State before the principal's reasonable exercise of authority is recognized. This opinion, happily, is shared with the New York State Commissioner of

Education, who was moved in *Matter of Port*, 9 Ed. Dep't Rep. 107 (1970), to "point out that the constitutional guarantee of freedom of speech and expression do not constitute a license for the use of obscenities in the public schools."

The U.S. Court of Appeals for the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia and West Virginia) in *Barker* v. *Hardway*, 283 F. Supp. 228, S.D.W. Va. (1968), *cert.* denied, 394 U.S. 905 (1969), held that 1st Amendment protection does not extend to college students who had demonstrated violently. The status of the plaintiffs as college students did not excuse their conduct, even though the courts distinguish between the discipline appropriate to various age levels.

The U.S. Court of Appeals for the Second Circuit in *Katz* v. *McAuley*, 438 F. 2d 1058 (1971), *cert.* denied 405 U.S. 933 (1972), observed:

> . . . we proceed on the premise that a state may decide that the appropriate discipline which requires the restriction of certain communicative actions may differ in the cases of university students from that called for in the cases of the younger secondary school pupils in relatively similar circumstances.

In *Schwartz* v. *Schuker*, 298 F. Supp. 238 (D.C.F.D., N.Y., 1969), a U.S. District Court in New York upheld the principal's suspension of a high school student for defiant behavior and insubordination growing out of distribution of an "underground" newspaper in the vicinity of the school building. A previous issue of the newspaper, principal Louis A. Schuker stated, had vilified him and "contained four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda." Again, the court emphasized the distinction between high school and college students:

> . . . the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen facts from propaganda.

The court concluded:

> . . . the freedom of speech and association protected by the First and Fourteenth Amendments are not "absolutes" and are subject to constitutional restrictions for the protection of the social interest in government, order and morality. While there is a certain aura of sacredness attached to the First Amendment, nevertheless, the First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding per-

missibility. Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also expulsion of a student.

There is no chasm between the principal who believes in 1st Amendment rights and the principal who believes in law and order. There is a Continental Divide between those who recognize the need for law and order and those who mistake license for liberty.

Students are free to debate controversial issues and should be encouraged to do so. But there can be no 1st Amendment protection for the student who uses the language of the sewer in school. And no student has the right by either word or deed to threaten the good order which is essential in our schools. It is for the principal to determine when that good order is threatened.

It seems clear that the courts are disposed to sustain the principal who acts to prevent high school students from using the 1st Amendment as a club with which to beat drums that can deafen and defeat those who plan for the education of young people in an atmosphere conducive to learning.

5. FREE PRESS: STUDENT STYLE

Principals badgered by the "underground" press are equally concerned with the above-ground press. It has only been in recent years that the freedom of the press, enjoyed by the adult community, is thought to be a constitutional right of school children.

Even in the educational community, brainwashing has produced a climate in which it might seem that four-letter words are the *lingua franca* of the student press. Yet, here too, it is far from certain that students carry with them the full panoply of constitutional rights. In *Tinker* the court stated that 1st Amendment rights are to be "applied in light of the special characteristics of the school environment."

Justice Stewart, concurring in *Tinker*, added that he:

> . . . cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise [just prior to *Tinker*] in *Ginsberg* v. *New York*, 390 U.S. 629. I continue to hold the view I expressed in that case. [A] State may permissibly determine that, at least in some precisely delineated area, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

In the realm of school publications the New York State Commissioner of Education has been zealous in protecting students' rights. In *Matter of Brociner*, 11 Ed. Dep't Rep. 204 (1972), he ruled that the only circumstances under which a board may "censor" free expression by students is where it is necessary to prevent substantial disruption or material interference with school activities.

In *Matter of Schiener*, 11 Ed. Dep't Rep. 293 (1972), the Commissioner held that if an unofficial student newspaper is to be distributed on school property, a board of education may constitutionally require prior submission of the copy for approval by school officials. But such review is only to prevent the dissemination of material which could disrupt the educative process or intrude upon the rights of other students. In addition, the board must adhere to definite guidelines as to where the material is to be submitted, to whom and for how long. On the other hand, students working on a publication must bear their measure of responsibility. A request that they be allowed to remain anonymous is not consistent with the requirements of responsible journalism.

Elsewhere in the nation courts have addressed themselves to student responsibility as journalists without agreement on its definition. In the *Scoville* case, 286 F. Supp. 988 (D.C.N.D. Ill., 1968), reversed, 425 F. 2d 10 (1970), *cert.* denied, 400 U.S. 826 (1970), the high school's literary journal charged the school administration with being "utterly idiotic" and "asinine"; the senior dean had a "sick mind"; an editorial urged students to ignore all propaganda that the school administration published. The lower district court had sustained the school board's decision to expel the students involved. But the U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana and Wisconsin) looked benignly on the students' "freedom of expression" and did not see that it contributed to any "substantial disruption of school activity. . . ."

Some 700 miles to the east, the Second Circuit took a critical look at how far school officials may go in controlling student distribution on school grounds of material that the school board viewed as interfering with the discipline of the school.

In *Eisner* v. *Stamford Board of Education*, 440 F. 2d 803 (1971), the court upheld the district court's finding that the board's policy was "fatally defective for lack of 'procedural safeguards'" to protect the students' right to freedom of expression. However, the Second Circuit held that "prior restraint" by school officials of written and printed materials by students is constitutional if a board sets forth its policy clearly. The policy statement should describe the kind of disruptions that might justify "censorship." It must also assure "an expeditious

review procedure" and specify where it would be appropriate to distribute approved materials.

The court saw that "it would be highly disruptive to the educational process if a secondary school principal were required to take a school newspaper editor to court every time the principal reasonably anticipates disruption and sought to restrain its cause." In brief, the Second Circuit held that "reasonable and fair regulations" by a school board determined to restrain students from abusing 1st Amendment rights would be looked upon favorably by the court.

In the area of school publications, the New York State Commissioner of Education and the courts have used the term "censorship" to describe the principal's preview of a student publication. The term is pejorative and is unreal in the school context.

The principal is a teacher. He and faculty advisers are teaching students to write, to handle controversial issues as objectively as possible, and to produce an attractive publication. The process is supported by school funds. While "censorship" has traditionally entered the realm of controversy engaged in by government and press, it scarcely applies to the student-teacher relationship in a secondary school.

Students are not expected to have the maturity of adults; nor are they expected to bear the brunt of public and in-school criticism which may stem from their unrestricted utterances. It is common knowledge that student writers often ignore or fail to check facts; flagellate faculty and fellow students who do not enjoy equal access to school media; and seek to disseminate, under protection of the 1st Amendment, falsehoods, half-truths, misconceptions and misspellings. To equate with "censorship" the reasonable corrective measures and plain teaching which go into getting out a student publication is to misunderstand the role of the principal.

For students to flee the principal's office for the shelter of the courts is to seek refuge where none is required. Administrative processes within a school system should be sufficient to resolve the crises that a learning experience in journalism may evoke.

The principal who anticipates that disruption will follow, or that the borders of decency will be violated by a student publication, should act to prevent such publication. No two publication experiences are identical and if the litigious seek to challenge the principal's judgment, let them bear the burden of a headlong rush to barrister and bench.

6. FLAG CEREMONIES

School tone has been affected by the decline in patriotism, a mood that takes simple but clear form in the growing lack of respect for the Pledge of Allegiance. Objection to the phrase "liberty and justice for all," contained in the Pledge, has been used to stir opposition to the Pledge among high school students and others. Not all who remain seated during the Pledge, or leave the room, or do not salute, or recite, are aware of any rationale for their conduct. Lack of respect for the national symbol of unity is often mindless or imitated, especially when there are no consequences.

Constitutional authority for refusal to salute the flag is embedded in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In this case the court's immediate objective was to protect the religious beliefs of children who were Jehovah's Witnesses. In the heat of World War II, the decision did not generate wholesale disrespect for the flag.

More recently, some judges have affirmed the right of school children to refuse to salute the flag. At least one judge, while ruling against the flag salute requirement in New York, was quick to affirm his own predilection for standing and saluting.

In New York there has been a welter of confusion over students' rights in the matter of the Pledge. One U.S. District Court judge ruled that students must not be required to leave the room and need not stand during the Pledge and that the principal not attempt to influence the "sitting student" to change his mind. Another U.S. District Court judge held that students must at least stand during the Pledge. And, in the meantime, the New York State Commissioner of Education ruled that the student must stand but he need not salute or recite.

The foregoing opinions, voiced separately in 1970, were consolidated by the U.S. Court of Appeals for the Second Circuit in *Goetz v. Ansell*, 477 F. 2d 636 (1973). The court upheld the right of a high school student to remain seated and not participate in the Pledge. In sustaining the student's right, the court said:

> If the state cannot compel participation in the pledge . . . it cannot punish non-participation . . . and being required to leave the classroom . . . may reasonably be viewed . . . as having that effect.

Even before the court made its pronouncement, most New York City principals had given up the daily Pledge. It remains, however, a requirement in the New York Education Law, Section 802. In Connecticut, New York and Vermont, the highest federal court (U.S. Court of Appeals for the Second Circuit) has insured the right of the youngster

to remain seated during the Pledge. No doubt principals in other jurisdictions know or can quickly determine the prevailing law or regulation on the flag salute.

There is nothing in the Second Circuit decision, it may be observed, that restrains a principal from talking with a student who does not salute the flag. The author has won renewed respect for the flag with reasoning that may be capsulized as follows: No one literally believes that there is "liberty and justice for all" in the United States or anywhere. But, in our country, we all have the right to strive to bring about "liberty and justice for all." In saluting the flag, we are giving voice to the desire that all of us should share.

Often the interest of the principal in the Pledge can affect improvement in the attitude of students. The flag salute, when it is required but ignored by any substantial number of students, generates disrespect for the flag. Hopefully, the courts in our time will see that no constitutional infirmity is imposed upon children who are required to salute the flag.

7. PERSONAL APPEARANCE OF STUDENTS

If school tone were dependent upon the attire and general appearance of students, we would be tempted to assess the tone as jarring. The wildest and weirdest appearances for boys and girls are the order of the day. Nevertheless, for the principal who is flexible there is no reason for complete despair even if his sense of propriety is at times offended by student dress or lack of it.

A New York judge lent a hand when he ruled in *Matter of Scott* v. *Board of Education*, U.F.S.D. No. 17, Hicksville 61 M. 2d 333, 305 N.Y.S. 2d 601 (S. Ct. Nassau Cty, 1969), that no student may wear skin-tight clothing which is revealing and thus may provoke or distract the opposite sex.

In *Matter of Dalrymple*, 5 Ed. Dep't Rep. 113 (1966), the New York State Commissioner of Education held that the board of education has the power:

> . . . to prohibit the wearing of such items as metal cleats on the shoes which might damage the floors, a type of clothing in physical education classes which unduly retricts the students from participation therein, long-haired angora sweaters in cooking classes where open flame gas ranges were used, any kind of apparel which indecently exposes the person, or, in sum, to prohibit the wearing of any kind of clothing which causes a disturbance in the classroom, endangers the student

wearing the same, or other students, or is so distractive as to interfere with the learning and teaching process.

In *Master of Jiminez*, 9 Ed. Dep't Rep. 172 (1972), the Commissioner ruled that a boy must remove his hat in class, except for headdress worn for religious reasons

Most principals have quite sensibly given up on hair length. Even basketball coaches have been unsuccessful in persuading the Commissioner that a player has to see the ball. It does not follow, however, that the principal is restrained from expressing disapproval of fashions: "non-conformists have no constitutional protection from criticism."

For a down-to-earth evaluation of the hair-raising experiences of schoolmen, we again have recourse to Justice Black who indicated some irritability in *Karr* v. *Schmidt*, 401 U.S. 1201 (1971), induced by his reading of:

> . . . a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. . . . There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States.

Despite Justice Black's demurrer, there continues to be some cutting court differences over hair length. A merciful solution might be return of the G.I. haircut as part of a "student rebellion" against those over 30 who have sought to imitate the young even to the extreme of wiggery.

The Supreme Court has shown understandable impatience with the volume of student discipline cases being sent its way. In most cases, it has refused *certiorari*. The Second Circuit has also called attention in *Farrell* v. *Joel (supra)* to the applicability of Gresham's Law to students' rights suits:

> We would hope, perhaps wistfully, that litigants and counsel on both sides would keep several things in mind before the rush is made to the federal courts with constitutional banners waving high.

It is not to be inferred from the foregoing that the student's day

in court is about to be shortened, or that the principal can sit down to fashion a dress code to his own taste. The New York Commissioner, for one, will not enforce a dress code even if it is adopted by the student body. The principal need not, however, look at the ceiling to avoid viewing a school that looks like a bathing beach. If the dress is distracting, he can be exacting.

8. SEARCHES AND SEIZURES

The 4th Amendment prohibition against *"unreasonable* (emphasis added) searches and seizures" is another constitutional safeguard that some students would abuse. Aided by civil libertarians, alert to every protection of the law, they would hold all searches and seizures to be unreasonable and thereby emasculate law enforcement officers.

The New York Court of Appeals in *Overton* v. *New York*, 20 N.Y. 2d 660 (1967), 24 N.Y. 522, 249 N.E. 2d 366 (1969), affirmed the right of a principal to search a student's locker. The case arose when police officers came to the school with a search warrant. At the request of the police, an assistant principal opened the student's locker and marijuana was found in the student's coat.

The marijuana was confiscated despite the student's objection to the search and seizure because he had not given his consent. The privacy which the student claimed for his locker applied as against other students, but not as against the principal of the school, or a teacher acting for the principal. The court regarded the search warrant, which was held to be an invalid one, as irrelevant and approved turning the contraband over to the police for criminal prosecution. The court emphasized the special relationship (*in loco parentis*) between the school and student:

> Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there.

In a Midwestern case, *State* v. *Stein*, 203 Kan. 638, 456 P. 2d 1 (1969), *cert.* denied, 397 U.S. 947 (1970), the right of school authorities to search a student's locker was affirmed:

> Although a student may have control of his school locker against his fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways for illegal purposes. We

believe this right of inspection is inherent in the authority vested in school adminstration and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student body preserved.

It has also been held that students may be searched by deans acting for the principal when there is reasonable suspicion that the student is in possession of drugs. In the case of a New York City high school student, who ran from the building, the dean (coordinator of discipline) had received information which caused him to go to a classroom from which he removed the boy.

As they walked to the dean's office, the dean noticed a bulge in the boy's pants pocket and observed him continually putting his hand in and taking it out of the pocket. As they neared the office, the defendant bolted for the door outside the school. The dean called to the policeman assigned to the school, who was outside the dean's office, "He's got junk and he's escaping."

Both gave chase. The dean was the first to reach the defendant, three blocks from the school. He grabbed the defendant by the wrist and the boy's hand came out revealing the nipple of an eyedropper with other material clenched in his fist. The dean held the defendant's wrist and said, "Give it to me." Thereupon, the dean opened the boy's hand and found a set of the "works"—syringe, eyedropper, etc. This material was then turned over to the police officer who came upon the scene at that moment. Criminal prosecution followed.

The Criminal Court judge in Bronx County held that the teacher was acting as a government official and had searched the defendant without "probable cause," in violation of his constitutional rights. The Bronx District Attorney appealed the decision.

In *People* v. *Jackson*, 319 N.Y.S. 2d 731 (1971), the court denied the motion to suppress the evidence. It observed that the 4th Amendment does not forbid all searches and seizures, but only unreasonable searches and seizures. Each search must be determined in its own setting.

Justice Vincent A. Lupiano of the Supreme Court, Appellate Term, First Department, in assessing the teacher's responsibility, observed:

> A school official, standing *in loco parentis* to the children entrusted to his care, has *inter alia,* the long honored obligation to protect him while in his charge, so far as possible, from harmful and dangerous influences, which certainly encompasses the bringing to school by one of them of narcotics and "works," whether for sale to other students or for administering such to himself or other students.

The dean, the court held, was acting "in fulfillment of a quasi-parental obligation. Moreover, this right and duty did not make him a law enforcement officer as the dissent suggests. Rather as the doctrine suggests, and simply stated, he was acting in a limited manner, in place of the defendant's parents."

The court held that:

> . . . the rigid standard, probable cause, may not be imposed upon a school official if he is expected to act effectively *in loco parentis*. . . . Rampant crime and drug abuse threaten our schools and the youngsters exposed to such ills. . . . In consequence, greater responsibility has fallen upon those charged with the well-being and discipline of those children. . . . Toward that end, a basis founded upon reasonable grounds for suspecting that something unlawful is being committed, or about to be committed, shall prevail before justifying a search of a student when the school official acts *in loco parentis*.

Justice Lupiano made it clear that the dean had the right to pursue the boy from the building:

> *In loco parentis* purpose did not end abruptly at the school door. The need to fulfill that purpose—including the making of a search—extended uninterruptedly beyond the school limits since the defendant chose to run away. This is a far cry from a situation not stemming from the school without the nexus existing here. Absent that nexus, the search and seizure by the Coordinator would be unreasonable and unlawful for the obvious reason that his duties and responsibilities originate within the school.

In *Delaware* v. *Baccino*, 282 A. 2d 869 (1971), the court looked beyond the immediate conviction of a student for drug possession. It held that the entire law of searches and seizures, arising from the 4th Amendment protection of the people, is not automatically incorporated into the school system:

> The Fourth Amendment is the line which protects the privacy of the individuals including students but only after taking into account the interests of society. In Delaware a principal stands *in loco parentis* to pupils under his charge for disciplinary action, at least for the purposes which are consistent with the need to maintain an effective educational atmosphere.

The Delaware judge referred to the New York decision in *People* v. *Jackson* (*supra*), quoting therefrom:

> [The] *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that . . . a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.

He concluded:

This standard should adequately protect the student from arbitrary searches and give the school officials enough leeway to fulfill their duties.

We shall end this section on the distasteful subject of searches and seizures with the understanding, based on court decisions, that the principal, or a teacher acting for him, is empowered to open lockers and search students without any warrant other than the reasonable exercise of his authority. In these parlous times, the principal will be searching for drugs, weapons, stolen goods, or any harmful material. If this power casts the principal in the role of a law enforcement officer, it is a responsibility imposed by great social changes.

9. COMMENTARY

It is possible to pore over court decisions and come up with a body of law that would place the principal's heart in the highlands. We have been dissuaded from such an approach by the realities of the day. There is no question but that the common sense approach to school discipline has been vitiated by pressure groups hostile to the reasonable exercise of authority by the principal.

Some judges, too, have stumbled over their robes in an effort to cloak children with the protective raiment of the Constitution. Other judges see that students who interfere with the rights of others have no special claim on constitutional rights. To these judges, it appears that application of adult-world rules to secondary schools can produce chaos rather than the good order that is essential to learning.

The principal has enough to do without immersing himself in case law the better to withstand legal battery. It should be sufficient that he be permitted to apply to disciplinary matters the "rule of reason" formulated by courts in other contexts. The courts should be a last resort. We have seen that some judges are more than willing to leave the burden of school discipline to the principals. The principal who is unreasonable will not have long to wait before the community reminds him of the value of common sense in disciplinary matters.

It seems to us that the principal who is reasonable in the exercise of authority is likely to be feted by all who believe that it is possible to be fundamentally fair (the essence of due process) and, at the same time, curb the excesses which have disfigured public education in America.